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Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000023-MR
AND
NO. 2017-CA-001115-MR

ROBERTA M. DICKSON; WILLIAM M. DICKSON; AND SULPHUR GUM, LLC — APPELLANTS/CROSS-APPELLEES

v.

APPEAL AND CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE BRIAN C. EDWARDS, JUDGE
ACTION NO. 11-CI-006921

MARY LOUISE DICKSON SHOOK; AND DICKSON OAKS, LLC — APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING, IN PART,
VACATING, IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, JONES AND K. THOMPSON, JUDGES.

ACREE, JUDGE: This intra-family dispute began with Appellee Mary Louise (Mollie) Dickson Shook's allegations of wrongdoing by her mother, Appellant

Roberta M. Dickson, and her brother, William Dickson (Bill), regarding Bill's management of a closely held family business entity, and allegations of Roberta's interference with Mollie's expectancy interest in the estate of her father, Stanley Dickson.

A Jefferson County jury sided with Mollie. For the various reasons set forth below, we reverse, in part, vacate, in part, and remand.

FACTS AND PROCEDURE

In 2000, Stanley and Roberta began estate planning together. That December, each executed separate wills and revocable trusts. As part of their plans, they sheltered real property in a limited liability company, Glen Oak, LLC, named after their farm which became the LLC's capital.

Glen Oak was somewhat informally divided into two tracts. A larger tract was known as "Bill's Farm" and a smaller tract was known as "Mollie's Farm." Glen Oak, LLC, had four members: Stanley; Roberta; Sulphur Gum, LLC (created by Stanley for Bill's benefit); and Dickson Oaks, LLC (created by Stanley for Mollie's benefit).[1] Although not a member of Glen Oak, LLC, Bill was the farm's manager. In accordance with the operating agreement for Glen Oak, LLC,

[1] Stanley created and filed articles of organization for each of these entities on December 27, 2000, under different names and subsequently filed articles of amendment for each, changing the names to Glen Oak, LLC; Sulphur Gum, LLC; and Dickson Oaks, LLC.

only Stanley and Roberta had a say in governance, with each holding 50% of the LLC's "Governance Units"; Sulphur Gum and Dickson Oaks were passive beneficial participants in Glen Oak's profits and losses.

Other parts of Stanley's and Roberta's December 2000 estate planning – *i.e.*, Stanley's will, his revocable living trust, and his power of attorney in favor of Roberta – are at the center of this litigation and appeal. Stanley's will bequeathed to Roberta certain tangible personal property. The residue of his estate, including such intangible property as his Governance Unit in Glen Oak, LLC, was to be conveyed at his death to a revocable living trust he executed as the trust's grantor and initial trustee ("Stanley's trust").

Stanley's trust provided that, upon his death, the successor trustee (Roberta, if she survived him) would divide his interest in Glen Oak, LLC (*i.e.*, his Governance Unit) equally between Mollie and Bill. The trustee was then to divide the remaining estate into two separate, but not equal, shares denominated the Marital Share and the Trust "B" Estate.

Stanley's trust was designed to minimize the tax impact on the Marital Share by requiring taxes to be paid from the Trust "B" Estate. In addition to other language intended to preserve the Marital Share, the trust provided that: "The Trustee shall have the sole discretion to select the assets which shall constitute the Marital Share. . . . Trust 'B' shall be the balance of the Trust Estate after the assets

have been selected for the Marital Share . . . ." The trust even contemplated the possibility that "the assets constituting Trust 'B' [could] be exhausted, or [that] Trust 'B' [could] not be established . . . ."[2]

After minimizing taxes, the priority for use of the Trust "B" Estate assets was to benefit Roberta. The trust granted Roberta an annual "right, at her discretion, to withdraw up to a maximum of five percent (5%) of the net fair market value of the Trust 'B' Estate . . . ." Furthermore, "until the death of [Roberta], the Trustee shall pay to or for the benefit of [Roberta] such sums from the remaining net income and/or principal of the Trust 'B' Estate as in the Trustee's reasonable discretion shall be necessary or advisable from time to time for the health, education, support and maintenance of [Roberta] according to the accustomed standard of living" she had come to enjoy while Stanley was alive. Once Roberta passes away, whatever remains of Trust "B" Estate assets, if anything, is to be divided equally between Bill and Mollie.

A few years after this round of estate planning, in 2006, Stanley and Roberta engaged in a second round. Because Bill's Farm was worth more than Mollie's Farm, Stanley amended his trust to add an "equalizing payment" to Mollie. In substance, after Roberta's death the trustee would first distribute to

[2] References to the language of Stanley's trust comes from Plaintiff's Trial Exhibit 2, [Stanley's] Revocable Living Trust Agreement.

Mollie from any remaining Trust "B" Estate assets the difference in value between the two farms before dividing the remainder between Mollie and Bill. Significantly, Stanley did not amend the provision of his original estate plan that permitted Roberta to use as much of the funds in the Trust "B" Estate for her own support as she deemed proper, nor did he designate or restrict any of the Trust "B" Estate to be set aside solely to make the equalizing payment.

At the same time, Roberta, too, amended her revocable living trust to add a "pour over" clause whereby her assets, including whatever remained of the Marital Share, would be conveyed upon her death to Stanley's Trust "B" Estate. Significantly, Stanley's and Roberta's estate planning, although coordinated, did not include a joint will. Nor did their planning include reciprocal provisions, either in their wills or their trusts, that would have the effect of a joint will or otherwise prohibit either from later amending any part of his or her respective estate plan.

The year 2009 brought a decline in Stanley's health, owing largely to Alzheimer's disease. It also brought a decline in Mollie's bond-trader husband's income from approximately $1.75M in 2008 to $340,000 in 2009. By September 2009, Mollie was pursuing a buyout of her interest in Glen Oak farm.[3] She sought

[3] Earlier in 2009, Mollie had engaged an attorney to obtain copies of financial records to assess Bill's management of the farm. Letter, Mollie's attorney to Roberta, February 20, 2009, Defendant's Exhibit 5.

approximately one-fourth of its assets which she valued at a little more than one-and-a-half million dollars ($1.5M).[4]

During this time, Mollie first told Roberta that Bill sexually abused her when she was fifteen years old, some thirty years earlier. Increasing levels of family strife ensued. Believing it best to retain control of Glen Oak, Roberta used her authority as Stanley's attorney-in-fact to sell his Governance Unit in Glen Oak to herself for $26,634.00. Stanley died the following day.

Mollie engaged counsel to accelerate her efforts toward a buyout. In a letter dated January 4, 2010, from her attorney to Roberta's attorney, Mollie claimed Bill mismanaged the farm and reiterated her assertion that Bill sexually assaulted her when she was fifteen requiring "years of therapy" for Mollie.[5] She said she was "prepared to initiate a complete accounting and investigation into Bill's conduct [and was] ready to take this and all other information public . . . . [She] strongly prefer[red] however, to informally resolve this as quickly as possible so that she can finally move on with her life."[6]

A week later, Roberta amended her will and bequeathed most of her estate to a new revocable trust. As stated in paragraph 3.3.1 of her new trust:

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[4] Letter, Mollie to Roberta, September 21, 2009, Defendants' Trial Exhibit 2.

[5] Letter, Mollie's attorney to Roberta's attorney, January 4, 2010, Defendants' Trial Exhibit 11.

[6] *Id.*

> The trustee shall set aside the sum of $1,500,000 reduced, however, by any amount payable at my death to [Mollie] pursuant to paragraph 5.a. of the Amendment to Trust Agreement executed by Stanley . . . referred to as "Mollie's Equalization Amount" [provided that Mollie,] subsequent to the date of this instrument and prior to [Roberta's] death . . . has not made public allegations of wrongdoing by [Bill] for the purpose of humiliating him or his wife, seeking revenge against him for injuries done to her (whether such allegations are true or untrue) or for some other malicious purpose . . . .

Roberta's estate planning after Stanley's death did not affect Stanley's trust. Although Mollie claims otherwise – that Roberta's new will and trust "interfered with the Equalizing Payment" – Mollie did not allege that Roberta failed to comply with the terms of Stanley's trust itself.[7] Stanley's trust and its component parts, the Marital Share and the Trust "B" Estate, remain unchanged to this day. To the extent the Trust "B" Estate has sufficient assets to fund the equalizing payment on the date of Roberta's death, Mollie still will receive the equalizing payment. This explains why Roberta's new trust provided for a reduction of the $1.5M set aside for Mollie to the extent remaining Trust "B" Estate assets are available to fund the equalizing payment.

However, Roberta's lawful access to Trust "B" Estate assets from which the equalizing payment is to be made still makes it possible, just as

[7] As discussed below, the trial court did not allow Mollie to amend her complaint a second time to include a claim against Roberta for breach of her duties as trustee of Stanley's trust.

Stanley's trust always recognized, that "the assets constituting Trust 'B' [could] be exhausted." Reading together the surviving provisions of Stanley's trust and its amendment shows that the equalizing payment will be made only to the extent there are assets in the Trust "B" Estate to fund it. Stanley's trust does not guarantee Mollie will ever receive the equalizing payment. The fact is that Mollie's compliance with the condition in Roberta's new trust would guarantee (to the extent of the value of Roberta's estate upon her death) that Mollie would receive $1.5M even if Trust "B" Estate assets were diminished or exhausted.

Mollie did not interpret Roberta's actions after Stanley's death this same way. She and Dickson Oaks filed suit in circuit court against Roberta, Bill, and Sulphur Gum. The court allowed a first amendment to the complaint after which Mollie's and Dickson Oaks' causes of action were as follows:

- Breach of fiduciary duty against Bill as manager of Glen Oak.
- Aiding and abetting Bill's breach of fiduciary duty, against Roberta.
- Breach of fiduciary duty against Roberta in her role as Stanley's attorney-in-fact.
- Aiding and abetting Roberta's breach of fiduciary duties, against Bill.
- Breach of contract against Roberta, Bill, and Sulphur Gum for sundry violations of the Glen Oak operating agreement.

- Tortious interference with devise against Roberta for conditioning the "equalizing payment" on Mollie's "silence regarding the incestuous rape by her brother . . . ." (R. at 622).

- Aiding and abetting Roberta's tortious interference with devise, against Bill.

- Intentional infliction of emotional distress/outrage (IIED)[8] against Roberta for executing what Mollie termed the "blackmail trust" in 2010 which attempted to "threaten, intimidate, and harass Mollie into remaining silent regarding Bill's incestuous rape of Mollie . . . ." (R. at 628).

Mollie moved to amend the complaint a second time to add claims that Roberta breached her fiduciary duties as trustee of Stanley's trust. Unwilling to allow those claims to be added, the circuit court denied the motion.[9]

[8] Outrage and intentional infliction of emotional distress are interchangeably used to describe the same tort. *See, e.g., Burgess v. Taylor*, 44 S.W.3d 806, 811 (Ky. App. 2001) ("The Kentucky Supreme Court recognized the tort of outrage or the intentional infliction of emotional distress in *Craft v. Rice*, Ky., 671 S.W.2d 247 (1984) . . . .").

[9] The trial court signed Mollie's proposed order but then drew lines through that signature. (R. 971). The subsequent order denies Mollie's motion to file a second amended complaint. (R. 1080). In addition, that subsequent order references the trial court's contemporaneous grant of partial summary judgment in favor of Roberta, stating: "Accordingly, the remaining claims are Plaintiff's claim regarding the Governance Unit and Plaintiff's claim regarding the Tort of Outrage." (R. 1080). Notwithstanding this narrowing of the issues, the trial court instructed the jury on a total of ten (10) of Mollie's claims: (1) breach of fiduciary duty as power of attorney (against Roberta); (2) breach of fiduciary duty as trustee (against Roberta); (3) breach of fiduciary duty as manager (against Bill); (4 - 6) aiding and abetting breach of fiduciary duty (against Bill for aiding and abetting Roberta in the breaches described in the first two counts and against Roberta for aiding and abetting Bill in the breaches described in the third count); (7) breach of contract (*i.e.*, the Glen Oak, LLC Operating Agreement) (against Bill and Roberta); (8) wrongful interference with devise or inheritance (against Roberta); (9) intentional infliction of emotional distress (against Roberta); and (10) punitive damages (against Roberta).

After extensive pretrial proceedings, the Jefferson Circuit Court conducted a multi-day jury trial in August 2016. The circuit court granted defendants' motion to dismiss the claim against Roberta individually for breaching fiduciary duties in operating/dissolving Glen Oak, after which the jury found for Mollie on all claims submitted to it.

The circuit court entered a judgment in November 2016, after which Appellants filed a lengthy motion for judgment notwithstanding the verdict, for a new trial, or to amend judgment; Mollie filed a motion for attorney fees. In May 2017, the circuit court denied all post-trial motions. These appeals followed.

ANALYSIS

I. Issues Presented

Appellants allege a host of errors. First, they contend the circuit court should have dismissed the tortious interference with devise claim or granted a directed verdict on that claim. They next contend the circuit court should have done the same regarding the IIED claim. Third, they argue the circuit court should not have given a punitive damages instruction. Fourth, they argue the circuit court should have dismissed the claim for breach of fiduciary duty against Roberta in her role as Stanley's attorney-in-fact. Fifth, they assert the judgment does not conform to the jury's verdict. Sixth, they claim the circuit court erred by instructing the jury on breach of fiduciary duty against Roberta in her role as trustee of Stanley's trust

after the court rejected Mollie's motion to amend the complaint addressing that claim. Seventh, they argue the jury instruction on the claim against Bill for breach of fiduciary duty in his role as manager of Glen Oak was erroneous. Eighth, they assert the circuit court should not have entered judgment against Bill for breach of contract and, relatedly, that the jury instruction on that claim should not have included Roberta. Ninth, they assert the $165,000.00 damage award aggregated for five (5) separate causes of action was improper. Finally, they argue that various evidentiary rulings by the circuit court were erroneous. The sole issue in the cross-appeal is the denial of attorney fees. We will consider these arguments, although not always in the order presented.

II. Tortious/Wrongful Interference with Devise/Expectation of Inheritance Is Not a Cause of Action Recognized in Kentucky

Some scholars erroneously assert that *Allen v. Lovell's Adm'x*, 303 Ky. 238, 197 S.W.2d 424 (1946) recognized tortious interference with an expectation of inheritance as a sustainable cause of action in Kentucky.[10] A closer reading reveals that *Allen* recognizes nothing more than what several other "courts in the early twentieth century recognized [–] a tort for the improper destruction of

[10] Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance--A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 Baylor L. Rev. 79, 84 n.15 (2003); John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 Stan. L. Rev. 335, 361 n.175 (2013).

wills." Virginia L.H. Nesbitt, *A Thoughtless Act of A Single Day: Should Tennessee Recognize Spoliation of Evidence As an Independent Tort?*, 37 U. Mem. L. Rev. 555, 580 n.134 (2007). Specifically, *Allen* says, "KRS[11] 434.280 [repealed 1974, Ky. Acts ch. 406, § 336, eff. 1-1-75] penalizes any person who destroys a will, and [KRS] 446.070 permits a person injured by the violation of a statute to recover damages by reason of the violation . . . ." *Allen*, 197 S.W.2d at 426.

There is no Kentucky Supreme Court opinion regarding the tort of interference with an expectation of inheritance. However, since 2003, this Court has explicitly stated in several unpublished opinions that Kentucky does not recognize such a tort.[12] "On all questions of law the circuit and district courts are bound by and shall follow applicable precedents established in the opinions of the

[11] Kentucky Revised Statutes.

[12] *Mason v. Stegall*, 2015-CA-000999-MR, 2017 WL 3129188, at *2 (Ky. App. July 21, 2017), *reh'g denied* (Oct. 3, 2017), *review denied* (Feb. 7, 2018) ("Kentucky does not recognize the tort of intentional interference with an inheritance"); *Hays v. Hays*, 2014-CA-001191-MR, 2015 WL 9413357, at *3-6 (Ky. App. Dec. 23, 2015) ("trial court . . . [held] that Kentucky . . . does not recognize such tort claim . . . [and even if] the *O'Brien* [*v. Walker*, 2002-CA-000976-MR, 2003 WL 22799031 (Ky. App. Nov. 26, 2003)] decision is an indication that this Court would . . . recognize a tort claim for intentional interference with the expectancy of an inheritance or gift, we do not believe that the facts presented herein warrant doing so at this time."); *Simmons v. Simmons*, 2012-CA-000383-MR, 2013 WL 3369421, at *9 (Ky. App. July 5, 2013), ("Kentucky has never overtly recognized and adopted this cause of action"); *O'Brien*, 2003 WL 22799031, at *2 (Without ruling whether the tort should be recognized, the Court affirmed the trial court's ruling that "'the facts of this case do not support a cause of action' for tortious interference with an inheritance[.]").

Supreme Court and its predecessor court and, when there are no such precedents, those established in the opinions of the Court of Appeals." SCR[13] 1.040(5). Although not binding precedent, "unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court." CR[14] 76.28(4)(c).

Appellants took every available opportunity to point out to the circuit court that this cause of action has not been recognized in Kentucky, often citing the unpublished cases in footnote 12, *supra*. Nevertheless, the circuit judge instructed the jury as though the tort had been recognized. That constitutes reversible error. *See Sandy River Cannel Coal Co. v. Caudill*, 22 Ky. L. Rptr. 1175, 60 S.W. 180 (1901) (error to instruct jury on comparative negligence because rule was not yet recognized in Kentucky). In essence, Mollie has two responses: first, any such error by the circuit court would be nullified if this Court, in this opinion, recognized the tort; and, second, the error is harmless anyway because there is no reasonable possibility that the error affected the judgment. We address both.

Mollie acknowledges that the tort has not been recognized explicitly here and, implicitly, urges this Court to do so now. She suggests we adopt the

[13] Kentucky Supreme Court Rules.

[14] Kentucky Rules of Civil Procedure.

articulation of the tort found in RESTATEMENT (SECOND) OF TORTS § 774B because Kentucky appellate courts have been persuaded by that treatise frequently. We are not persuaded by that generalization.

The previous occasions afforded this Court to recognize the tort were teed up as cases in which the circuit court appropriately refused to instruct the jury on the cause of action. This case presents the opposite situation and, therefore, more directly presents the question. We recognize the need to express clearer precedent, at least until our Supreme Court can address it. And so, we will.

This Court has not hesitated, on occasion, to recognize torts for the first time, and the Supreme Court indicates that doing so is within our authority. *See, e.g., Presnell Const. Managers, Inc. v. EH Const., LLC*, 134 S.W.3d 575, 581 (Ky. 2004) (noting the Court of Appeals first recognized the tort of negligent misrepresentation in *Chernick v. Fasig-Tipton Kentucky, Inc*., 703 S.W.2d 885 (Ky. App. 1986)); *MV Transp., Inc. v. Allgeier*, 433 S.W.3d 324, 336 n.10 (Ky. 2014) (citing two Court of Appeals opinions each recognizing a tort for the first time: "*McDonald's Corp. v. Ogborn*, 309 S.W.3d 274, 291 (Ky. App. 2009) (recognizing negligent supervision); *Oakley v. Flor-Shin, Inc*., 964 S.W.2d 438, 441-42 (Ky. App. 1998) (recognizing negligent hiring and retention)."). But being possessed of authority and exercising it are separate matters.

In this case, we choose to resist the "temptation . . . to draw expansive conclusions about the state of tortious interference [with inheritance] from the decisions in [sister] jurisdictions, b[ecause] it is a messy landscape that does not lend itself to neatly packaged principles of law." Rebecca M. Murphy and Samantha M. Clarke, *A New Hope: Tortious Interference with an Expected Inheritance in Rhode Island*, 22 Roger Williams U.L. Rev. 531, 551 (2017).[15] That is especially true for Kentucky where our jurisprudence somehow causes scholars to "disagree about whether Kentucky [currently] recognizes tortious interference [with inheritance]." *Id.* at 545 n.94.

We expressly hold that Kentucky does not recognize the cause of action known as tortious interference with inheritance or gift, or as Mollie expresses it in this litigation, wrongful interference with devise. The circuit court's erroneous Instruction No. 9 on a nonexistent cause of action is presumed to be prejudicial. *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012) ("[E]rroneous instructions to the jury are presumed to be prejudicial." (quoting *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997))). For that reason, we must reverse the portion of the verdict responsive to Instruction No. 9.

[15] *See* 2 Ky. Prac. Prob. Prac. & Proc. §1572 (2018) ("Kentucky has never overtly recognized and adopted a cause of action of intentional interference with an inheritance; however, neither has it been rejected."). According to Murphy and Clark, roughly twelve states have not opined on the tort, eleven have declined to recognize it and twenty-seven have adopted it. Murphy and Clarke, *A New Hope*, 22 Roger Williams U.L. Rev. at 543-57.

There is an additional reason for declining recognition of the tort based on the allegations Mollie presents. Nonrecognition does not risk offending the "maxim of the law . . . that, 'There is no wrong without a remedy.'" *Cornett's Ex'r v. Rice*, 299 Ky. 256, 261, 187 S.W.2d 454, 456 (1945). As we discuss in Section V, below, the legislative scheme of KRS Chapter 395[16] already provides a remedy, and a forum, for the wrong Mollie alleges. Granting her plea to save this verdict by fashioning a new remedy when one already exists would invite just criticism for basing our decision on sympathy, not necessity.

We thus reject Mollie's first reason for affirming the verdict – recognizing a new cause of action. That leads us to the second reason Mollie urges us to affirm the judgment notwithstanding the circuit court's instruction error – that such error was harmless.

III. Circuit Court's Error in Instructing Jury on Unrecognized Tort Was Not Harmless Error

The presumption of prejudice is rebuttable, but the party claiming the erroneous instruction was harmless bears the burden of affirmatively showing that no prejudice resulted from the error – that means proving "there was 'no reasonable possibility' the erroneous jury instruction affected the verdict." *Osborne*, 399 S.W.3d at 13 (quoting *Emerson v. Commonwealth*, 230 S.W.3d 563,

[16] See also Chapter 394 regarding wills, and the statutory and common law regarding ademption.

570 (Ky. 2007)). Mollie attempts such proof by arguing "it is not necessary that this Court even reach the question of Roberta['s] tortious interference with Stanley's estate plan . . . because Roberta breached the fiduciary duties she owed to Mollie as Stanley's trustee [which] Roberta became . . . at his death." (Appellees' brief, p. 13).

The first and obvious flaw in Mollie's argument is that the circuit court rejected her attempt to add this charge that Roberta breached her fiduciary duty as Stanley's trustee. That the circuit court nevertheless instructed the jury on that claim after rejecting it perplexes this Court. But that perplexity does not prevent us from recognizing the second and certainly fatal flaw – there was no evidence to support such a claim. No matter how generously we read Mollie's allegations that Roberta engaged in wrongful, unlawful, or unauthorized conduct to prevent Mollie's receipt of the "equalizing payment," there is no way to construe the instruments constituting the estate planning of Stanley and Roberta other than that they did not prohibit Roberta's conduct following Stanley's death, nor did Roberta's estate planning impact the operation of Stanley's trust.

For these reasons, and as further explained below, the circuit court's instruction on a cause of action not recognized in this jurisdiction, Instruction No. 9, constitutes reversible error.

IV. Roberta's Estate Planning Conduct Is Not Actionable

Mollie attempts to salvage the verdict and judgment on an unrecognized cause of action by characterizing Roberta's estate planning as actionable misconduct. Her conflation of the equalizing payment in Stanley's trust and the $1.5M conditional bequest in Roberta's new trust contributes to the confusion of these already complex facts.

However, we previously explained that Roberta's personal estate planning leaves Stanley's estate planning, including the equalizing payment, intact. Stanley's trust authorizes Roberta, as trustee, to identify what trust assets make up her Marital Share and what assets make up the Trust "B" Estate. It authorized Roberta, as trustee, to determine what Trust "B" Estate assets she deemed necessary to maintain her accustomed standard of living. As previously noted, Stanley's trust contemplated the possibility that Roberta might deplete Trust "B" Estate assets before she dies, in which case Mollie will not receive an equalizing payment. Mollie's expectation in the equalizing payment was always tenuous.

Notwithstanding Mollie's contention to the contrary, Stanley did not arrange a guaranteed funding mechanism for the equalizing payment. If Stanley had so desired, he could have guaranteed Mollie would receive the equalizing payment. For example, he could have directly bequeathed to Mollie a sum certain. He could have entered into an agreement with Roberta under KRS 394.540 that

Roberta not amend or revoke her will, in which case her assets would pour over into Stanley's trust (specifically the Trust "B" Estate) at her death, thereby increasing the likelihood that sufficient Trust "B" Estate assets would be available to make the equalizing payment.[17] *See, e.g., Terrill v. Estate of Terrill*, 217 S.W.3d 858, 862 (Ky. App. 2006) ("If the Terrills had desired that William, as their only grandson, should receive the benefits of their bounty following the deaths of their sons and their spouses, any moderately skilled estate planning attorney could have helped them accomplish that result."); *Fryxell v. Clark*, 856 S.W.2d 892, 895 (Ky. App. 1993) (surviving spouse's subsequent will held void because it defeated joint will with deceased spouse). But Stanley did not elect either of these or any other options. Guaranteeing to Mollie that she would receive the equalizing payment unquestionably was not the priority of Stanley's and Roberta's estate planning. Assuring Roberta could live out her days according to the lifestyle to which she had become accustomed was.

[17] KRS 394.540 provides:

> (1) A contract to make a will or devise, or not to revoke a will or devise or to die intestate, if executed after June 16, 1972, can be established only by:
>
> (a) Provisions of a will stating material provisions of the contract;
>
> (b) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
>
> (c) A writing signed by the decedent evidencing the contract.
>
> (2) The execution of a joint will or mutual wills gives rise to no presumption of a contract not to revoke the will or wills.

To the extent Trust "B" Estate assets are sufficient at Roberta's death to fund all or part of the equalizing payment, Stanley's trust compels Roberta's successor trustee to make it. In other words, Roberta has not changed the essential terms of Stanley's estate plan regarding the equalizing payment.[18]

Did Stanley believe Roberta would leave her estate to his trust as directed by her will in effect when he died? Perhaps so, but his belief is irrelevant.

Mollie fails to point this Court to anything in the record showing Roberta was legally obligated to refrain from engaging in her own estate planning. And Roberta's personal estate planning is the only conduct Mollie points to as evidence of her misconduct as Stanley's trustee. As a matter of law, Roberta had a right to plan her estate as she saw fit. Her estate-planning conduct was nothing more or less than her exercise of "the right to discriminate between the objects of h[er] bounty in such manner as [s]he chose to do," *Zimlich v. Zimlich*, 90 Ky. 657, 14 S.W. 837, 838 (1890), and that is a right "we will guard jealously . . . ." *Williams v. Vollman*, 738 S.W.2d 849, 850 (Ky. App. 1987) (quoting *Waggener v. General Assoc. of Baptists*, 306 S.W.2d 271, 273 (Ky. 1957)); *see also Terrill*, 217 S.W.3d at 862 (holding that "the longstanding rule in Kentucky is that a testator, of

[18] The fact Roberta did not alter the terms of Stanley's will or trust distinguishes this case from one cited by Appellees, *Trzop v. Hudson*, 43 N.E.3d 178 (Ill. App. Ct. 2015). In *Trzop*, a man changed the beneficiaries of a trust entered with his late wife, the net effect being to disinherit some of his children. Although not noted by Appellees, *Trzop* is not final. *See* 48 N.E. 3d 677-78 (Ill. 2016).

sound mind and under no undue influence, is generally free to leave his or her property to such persons or institutions, in such shares *and on such conditions*, as he or she deems prudent." (emphasis added) (footnote omitted)).

As we discuss more fully below, the jury's verdict and award of damages against Roberta on Instruction No. 5 regarding breach of fiduciary duties as trustee of Stanley's trust cannot stand as a matter of law and must be reversed. Therefore, we are not persuaded that the circuit court's error in instructing and entering a judgment on the non-recognized tort of wrongful interference with inheritance is made harmless because of the verdict based on Instruction No. 5.

Having thus addressed the judgment entered based on Roberta's conduct after Stanley's death, we turn to consider the judgment relative to Roberta's conduct before his death.

V. The Circuit Court Lacked Subject Matter Jurisdiction Regarding the Claim of Roberta's Breach of Fiduciary Duty as Stanley's Attorney-In-Fact

Mollie's claim that Roberta breached her duty of utmost good faith as Stanley's attorney-in-fact by purchasing his Governance Unit presents different issues.[19] For example, "it is debatable whether standing exists for a potential

[19] Our own jurisprudence is consistent with the warning from "[t]he two primary works of legal scholarship that have explored the nature of DPOAs [durable powers of attorney] . . . [in that] both recognized the role of the AIF [attorney-in-fact] remains relatively 'unscripted.' " Nina A. Kohn, *Elder Empowerment As A Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 Rutgers L. Rev. 1, 12 (2006) (citing Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role*, 75 Neb. L. Rev. 574, 577 (1996) and

beneficiary of the grantor of a power of attorney to claim breach of fiduciary duties." *Ingram v. Cates*, 74 S.W.3d 783, 786 (Ky. App. 2002). However, we need not address such issues. We conclude the circuit court lacked subject matter jurisdiction to hear Mollie's claim of such a breach.

"Subject matter jurisdiction issues are different than other issues because they may be raised at any time, even by the court itself." *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 15 (Ky. 2007) (citing *Commonwealth Health Corporation v. Croslin*, 920 S.W.2d 46, 48 (Ky. 1996) (noting the Court's "inherent power" to raise *sua sponte* the issue of subject matter jurisdiction)). The parties' arguments do dance around and touch upon the issue without addressing it directly. However, the authorities they cite lead us to conclude Mollie pursued her claim in the wrong forum.

Roberta argues *Maratty v. Pruitt*, 334 S.W.3d 107 (Ky. App. 2011) compels dismissal of this circuit court claim because the district court's approval of her final settlement of Stanley's probate estate satisfies the elements necessary to the defense of *res judicata*. Molly responds by saying *Maratty* only applies to claims of mismanagement against an executrix and her claim is against Roberta as Stanley's attorney-in-fact. Furthermore, says Molly, she is seeking to restore to the

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Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 Ga. L. Rev. 1, 12 (2001)).

probate estate a specific property – the Governance Unit – that did not come into Roberta's hands as executrix, but should have.[20]

We agree with Mollie that Roberta's argument fails, but not for the reason Mollie asserts. It fails because "to apply *res judicata* . . . the prior action must have been decided on its merits." *Harrod v. Irvine*, 283 S.W.3d 246, 250 (Ky. App. 2009). This record shows Mollie never contested the issue in the district court probate proceeding.[21] In the end, that is Mollie's mistake.

Further countering Roberta's argument, Molly claims *Priestley v. Priestley*, 949 S.W.2d 594 (Ky. 1997) controls. She says *Priestley* stands for the principle that "a decedent's heirs **could** assert claims in circuit court related to an administratrix's breaches of fiduciary duty during the decedent's lifetime pursuant to her role as decedent's power of attorney [*i.e.*, attorney-in-fact] and guardian." (Appellees' brief, p. 25 (emphasis in original)). Roberta responds by arguing *Priestley* is inapplicable because, in that case, "heirs brought an action in circuit court against the executrix of a probate estate while the estate was still open and

[20] Whether the sale of the Governance Unit constituted an ademption is not before us, nor has Molly expressly argued Roberta's purchase of the Governance Unit amounted to conversion.

[21] Regarding "whether the District Court approved or even reviewed Roberta's actions as Stanley's attorney in fact during his lifetime . . . ," Mollie says, "It is obvious . . . that the court did not conduct such a review." (R. 73, Mollie's response to motion to dismiss).

before the executrix had been discharged." (Appellants' brief, p. 20 (emphasis in original)). On this point, Roberta is correct.

The causes of action filed in circuit courts in *Priestley* and *Maratty* were statutory causes of action brought pursuant to KRS 395.510.[22] In *Priestley*, for example, the Court held, "The determination that [a decedent's fiduciary] breached *inter vivos* fiduciary duties is sufficient if sustained by the evidence and otherwise. . . . [U]pon the filing of a claim pursuant to KRS 395.510 where acts of mismanagement, fraud or deception are alleged, the circuit court has jurisdiction to settle the estate and adjudicate all claims associated therewith. KRS 24A.120." *Priestley*, 949 S.W.2d at 597. Mollie's claim was that Roberta breached *inter vivos* fiduciary duties she owed Stanley during his lifetime. To that extent, her claim

[22] "Numerous decisions of this Court have unequivocally upheld the circuit court's jurisdiction to settle an estate of a decedent under KRS 395.510(1). *Peoples National Bank v. Guier*, 284 Ky. 702, 145 S.W.2d 1042; *Smith v. Graham*, 274 Ky. 144, 118 S.W.2d 194; *Taylor v. Taylor*, 223 Ky. 799, 4 S.W.2d 752; *Carpenter v. Wilhoite's Adm'x*, 213 Ky. 75, 280 S.W. 481; *Allen v. Foth*, 210 Ky. 343, 275 S.W. 804; *Tanner v. Ayer*, 209 Ky. 247, 272 S.W. 720." *Myers v. State Bank & Tr. Co.*, 307 S.W.2d 933, 934 (Ky. 1957). *See also Hale v. Moore*, 289 S.W.3d 567, 570 (Ky. App. 2008) ("Kentucky Revised Statutes ('KRS') 395.510(1) . . . authorizes a legatee or distributee to file suit in circuit court to settle a probate estate."); *White v. White*, 883 S.W.2d 502, 504 (Ky. App. 1994) ("Ky. Rev. Stat. (KRS) 395.510 and 395.515 provide a method by which a representative, legatee, distributee or creditor may bring an action in circuit court to settle an estate at least six months after the qualification of the personal representative."); *Lee v. Porter*, 598 S.W.2d 465, 467 (Ky. App. 1980) ("[I]in those situations where mismanagement, fraud, deception or other causes which required proceedings adversary in nature, then the circuit court had jurisdiction pursuant to KRS 395.510."); *Skinner v. Morrow*, 318 S.W.2d 419, 424 (Ky. 1958) ("KRS 395.510 provides that a settlement action may not be brought by any person except the personal representative until the expiration of six months after the qualification of the representative.").

was like that in *Priestley*. The critical difference is that Mollie did not bring the suit pursuant to KRS 395.510. Furthermore, even applying notice pleading principles, it would be impossible for us to read her complaint as being based on the statute because administration of the estate already had ceased.

To be sure, there is a window of opportunity for claims to be brought under KRS 395.510. For everyone other than the personal representative, that window opens "six months after the qualification of [the personal] representative." KRS 395.510(1); *Smith v. Graham*, 274 Ky. 144, 118 S.W.2d 194, 197 (1938) (statute establishes "right of an interested party to bring a settlement suit six months after the qualification of the administrator"). It closes when administration of the estate is complete. *Wood v. Wingfield*, 816 S.W.2d 899, 905 n.8 (Ky. 1991) ("The statutory scheme of KRS 395.510 *et seq.* requires that the estate be in administration.").

In this case, the window for Mollie to bring an action in circuit court under KRS 395.510 opened on May 16, 2010, six months after Roberta was appointed executrix, and it closed not later than July 18, 2011, when Roberta's administration of the estate ceased.[23] Although Mollie was aware of the

[23] The district court overseeing Roberta's administration of Stanley's estate entered an order approving of final settlement on June 9, 2011, setting a deadline for objections of July 8, 2011 and setting a final hearing for July 18, 2011. (R. 54).

administration of her father's estate, and was represented in that district court action by counsel, she did not assert a fiduciary breach claim against Roberta until October 24, 2011, when she alleged an independent, and heretofore unrecognized, derivative claim in circuit court.

We are not saying Mollie's allegations do not present the potential for a viable claim.[24] We are saying she brought the claim in the wrong forum. Taking Mollie's allegations as true – that Roberta breached her duty of utmost good faith as Stanley's attorney-in-fact, thereby damaging his estate and his beneficiaries – then it was Roberta's duty as Stanley's executrix to pursue the claim for the estate and obtain restitution in whatever form the proof established. *Taylor v. Taylor's Ex'rs*, 211 Ky. 309, 277 S.W. 278, 280 (1925) ("The duty of the personal representative to collect debts due the estate of his decedent is not changed by the fact that he is the debtor . . . ." (citation and internal quotation marks omitted)). Roberta, as executrix, could have brought the action in circuit court. *Ingram*, 74

[24] In addition to pointing out that the role of an attorney-in-fact under a durable power of attorney is largely unscripted, one scholar in this area makes the following point: "If the agent [*i.e.*, attorney-in-fact] knows that the principal has made a will or created a trust that will distribute assets after the principal's death, the agent should avoid taking any action that will defeat the principal's estate plan. If, for example, the principal has made specific gifts in a will, the agent should avoid acts that would defeat those gifts by causing an ademption. . . . If the agent unreasonably defeats a principal's testamentary desires, the agent should be liable to the disappointed legatees." Dessin, *supra*, 75 Neb. L. Rev. at 614-16.

S.W.3d at 787 ("action filed by Cates, as executor of Mr. Ingram's will, for breach of fiduciary duties by the attorney-in-fact, Dr. Ingram"). Obviously, Mollie agrees.

She acknowledges by her express allegation of a "derivative" claim that such a claim is the estate's to pursue. Mollie even made demand upon Roberta as executrix to pursue the claim, and justly so. As we indicated, "it was [Roberta's] duty as [execu]trix to marshal the assets of the estate and collect sums which might have been due the decedent for benefit of the estate (KRS 395.195) . . . ." *Priestley*, 949 S.W.2d at 598. Presumably, Roberta concluded that the consideration she paid for the Governance Unit rather than the unit itself was the asset she was obligated to marshal.

Roberta's implicit disagreement with Mollie's position that her purchase of the Governance Unit was improper did not eliminate Mollie's options under the legislative scheme of KRS Chapter 395. The forum to raise that disagreement, the forum for pursuing the "derivative" claim she filed, was the district court and, only failing satisfaction there, either the statutory action under KRS 395.510 or the exceptions and appeal process of KRS 395.617. The legislative scheme provided Mollie's remedy, vesting subject matter jurisdiction in the district court for such contests as the "derivative"-type claim she proposed in the incorrect forum, circuit court.

One purpose of KRS 395.510 is to empower interested parties, prior to settlement of the estate, to challenge an executrix's decision not to pursue a claim. This purpose is especially important when, as Mollie argues here, it is in the executrix's "personal interest to ignore her own possible defalcation." *Id.* A good example is *Priestley* in which "claims were brought against the decedent's administratrix asserting that she breached duties as a testamentary fiduciary by failing to recover for benefit of the estate sums which she herself had wasted or improperly diverted during her tenure as *inter vivos* fiduciary." *Priestley*, 949 S.W.2d at 597.

In the case before us, despite Mollie's participation in the probate action, she remained silent on that record (at least to the extent the district court record is incorporated in the circuit court record we have under review). Although the district court had subject matter jurisdiction to hear claims like Mollie wanted to assert, and although the district court had personal jurisdiction of Roberta, Mollie allowed Stanley's estate to close without objection. She chose not to object despite a legislative scheme that, as *Maratty* tells us, anticipates such contested issues should first be addressed in the district court.

In *Maratty*, as here, "heirs argue[d] that claims involving breach of fiduciary duties are reserved solely to circuit court, citing *Priestley v. Priestley*, 949 S.W.2d 594 (Ky. 1997) . . . ." *Maratty*, 334 S.W.3d at 111. Justice VanMeter,

writing for this Court at the time, said that argument "ignores that the legislature establishes jurisdiction of district court. Ky. Const. § 113(6). A[nd] the legislature has given the district court jurisdiction over the settlements and accounts of fiduciaries, *even those that might be contested*." *Id.* (emphasis added).

More specifically, *Maratty* says "the district court ha[s] *exclusive* jurisdiction to adjudicate . . . an allegation of mismanagement for which the remedy sought was a judgment of restitution . . . *subject only to being divested of such jurisdiction by an action in circuit court properly filed under KRS 395.510*." *Id.* at 111-12 (emphases added). In this case, the district court's exclusive jurisdiction was not divested by an action brought under KRS 395.510. Jurisdiction, therefore, remained in the district court.

Mollie no doubt would argue that *Maratty* can be distinguished. She now denies hers was a derivative claim on behalf of the estate and says she "did not allege that Roberta breached her duties as executrix" but rather as Stanley's attorney-in-fact. (Appellees' brief, p. 24). That position does not survive scrutiny.

First, Mollie's complaint contradicts her new denial. It says she "made demands to Roberta, as executrix of the Estate, to bring the claim asserted [*i.e.*, Roberta's breach of duty as Stanley's attorney-in-fact], but Roberta has refused to do so. Accordingly, the Plaintiffs [Mollie and Dickson Oaks] are asserting such claim derivatively on behalf of the estate, successor in interest to

any claims possessed by Stanley at the time of his death." (R. 19, ¶ 94). Our thorough research, and search, for a jurisprudential basis for such a derivative claim turned up nothing. There is no such cause of action and we are not inclined to recognize one for the first time here.

Second, soon after *Maratty* was rendered, the Supreme Court adopted Justice VanMeter's analysis, stating: "in probate proceedings the district court has exclusive jurisdiction to oversee the management and settlement of accounts. *See* . . . *Maratty v. Pruitt*, 334 S.W.3d 107 (Ky. App. 2011)." *Karem v. Bryant*, 370 S.W.3d 867, 870 (Ky. 2012).

The legislature provided Mollie still further recourse in KRS 395.617, allowing her to challenge Roberta's decision to settle Stanley's estate without pursuing restitution of the Governance Unit. That recourse is described in *Maratty*, too. As the case says:

> Of the four ways to settle an estate,[25] we observe that with respect to the latter three, *the legislature* has established jurisdiction in district court, and has *contemplated that contested issues may arise with respect to those district court settlements*. *See* KRS 395.617(1) (providing that *"[i]f exceptions are filed, other evidence besides that reported may be heard, and the court shall upon the whole case, reject, confirm, alter, or amend the*

[25] "KRS Chapter 395 sets out four ways a probate estate may be settled: KRS 395.510 to 395.550 (circuit court action to settle an estate); KRS 395.605 (informal final settlement); KRS 395.610 to KRS 395.630 (periodic or final settlement in district court); and KRS 395.617 (proposed periodic or final settlement in district court)." *Maratty*, 334 S.W.3d at 110-11.

> *proposal*[ ]"); KRS 395.630 (providing that "[i]f exceptions are filed, other evidence besides that reported may be heard, and the court shall upon the whole case, reject, confirm, alter or amend the proposal[ ]").

Maratty, 334 S.W.3d at 111 (emphasis added). Roberta served Mollie's counsel with her final settlement on April 29, 2011. (R. 57). She then filed it with the district court on May 2, 2011 saying, "there are no further assets to collect . . . and that there is no reason for this estate to be held open any longer." (R. 56). On June 9, 2011, the court set a hearing for July 18, 2011, and gave interested parties, such as Mollie, until July 8, 2011, to file exceptions to Roberta's settlement. (R. 54). No one filed any exceptions. Mollie did not appeal the district court's order approving the final settlement as KRS 395.617(2) authorizes.

The appropriate forum for adjudicating Mollie's claim that Roberta breached her duty as Stanley's attorney-in-fact is the district court. Despite having the legal means and opportunities to present the claim in that proper forum, she declined to do so. Whether it has been or would be possible at any time since to reopen the estate to address this issue is, in the first instance, a matter for the district court to decide.

The operative facts of Mollie's claim for breach of Roberta's fiduciary duty as Stanley's attorney-in-fact involve the management and settlement of Stanley's probate estate. Because "the district court has exclusive jurisdiction to oversee the management and settlement of [such] accounts[,]" *Karem*, 370 S.W.3d

at 870, other than those brought pursuant to KRS 395.510, the circuit court lacked subject matter jurisdiction over this claim. The circuit court committed reversible error by permitting the jury to award damages based on Instruction No. 4 addressing such claim.

VI. Judgment on Claim of Intentional Infliction of Emotional Distress Is Not Supported by Expert Evidence of Severe Emotional Distress

The judgment found Roberta liable to Mollie on her allegations that Roberta intentionally inflicted emotional distress upon her by conditioning a bequest in her own estate planning on Mollie's public silence regarding her sexual assault allegations.[26] We agree with Appellants that Mollie's claim fails because she did not present expert testimony of severe emotional distress.

To affirm the verdict and judgment on her IIED claim, there must be evidence in the record supporting each element of the cause of action. Those elements are that Roberta: (1) engaged in intentional or reckless conduct which (2) was so intolerable and outrageous that it offended generally accepted standards of morality and decency and (3) caused Mollie severe emotional distress. *See Keaton v. G.C. Williams Funeral Home, Inc.*, 436 S.W.3d 538, 544 (Ky. App. 2013).

[26] The parties squabble about whether Mollie was totally prohibited from publicly discussing the alleged sexual assault by Bill or whether she was only prohibited from doing so for malicious reasons, but we need not parse the terms of Roberta's trust because Mollie has not presented sufficient evidence to support the IIED judgment.

Proof of the first element is that Roberta intentionally conditioned a bequest to Mollie upon Mollie's refraining from discussing questionable family matters. Roberta does not deny that was her intent.

Regarding the second element, we are loath to restrict a person's right to impose upon the objects of her bounty a condition that is not unlawful, such as requiring a legatee to refrain from public discussion of family matters. Affirming the judgment on this IIED claim would effectively hold that such lawful estate planning is so intolerable and outrageous that it offends generally accepted standards of morality and decency. As noted earlier, we jealously guard a person's right to engage in lawful estate planning. *Williams*, 738 S.W.2d at 850. Our jurisprudence protects the right of persons of sound mind, such as Roberta, to impose upon any bequest "such conditions, as he or she deems prudent." *Terrill*, 217 S.W.3d at 862 (citations omitted). As an alternate reason for reversing the judgment on this claim, we believe this suffices. However, we conclude that even if we refrain from holding, as a matter of law, that Mollie's IIED claim should not have been submitted to the jury because it is based on Roberta's lawful estate planning, the claim still fails for an absence of proof to support the third element of the claim – severe emotional distress.

Because "some degree of emotional harm is an unfortunate reality of living in a modern society[,]" our Supreme Court emphasizes the severity prong by

holding an emotional injury is severe only when "a reasonable person, normally constituted, would not be expected to endure the mental stress engendered by the circumstances of the case. Distress that does not significantly affect the plaintiffs [sic] everyday life or require significant treatment will not suffice." *Osborne*, 399 S.W. 3d at 17 (footnotes omitted). Therefore, "a plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment." *Id.* at 17-18; *Indiana Ins. Co. v. Demetre*, 527 S.W.3d 12, 39 (Ky. 2017) ("*Osborne*'s requirement of expert medical or scientific proof is limited to claims of intentional or negligent infliction of emotional distress.").

Mollie testified at trial that she was "devastated" after she learned of what she calls Roberta's "blackmail trust." (Video Transcript ("VT") 8/29/16; 10:33:40). Dr. Timothy Allen, a psychiatrist, interviewed and evaluated Mollie. (VT 8/25/16; 10:21:50). He noted that Mollie reported occasionally feeling depressed and nervous. (VT 8/25/16; 10:30:56). Ultimately, Dr. Allen diagnosed Mollie as having post-traumatic stress disorder (PTSD) relative to the events when she was fifteen years old, but with "quite low" active symptoms. (VT 8/25/16; 10:45:10). People with PTSD "get better" even without treatment, and can have long periods of not having "any symptoms showing." (VT 8/25/16; 10:46:30). But Mollie's IIED was not based on what she said happened when she was fifteen.

Closer to the present, Mollie told Dr. Allen her symptoms re-emerged when she began to have conflict with Bill regarding "the estate," and she felt sad when Roberta changed her estate plan. (VT 8/25/16; 10:50:32).

However, Dr. Allen testified that Mollie functioned "very well" for the past couple of years and enjoyed previous lengthy, asymptomatic periods. (VT 8/25/16; 10:26:25). On cross-examination, Dr. Allen testified that Mollie did not need any treatment. (VT 8/25/16; 11:27:50). Significantly, Dr. Allen admitted he had not evaluated the severity of any emotional distress experienced by Mollie. (VT 8/25/16; 11:28:04). He also testified Mollie had never been prescribed a psychiatric medication. (VT 8/25/16; 11:31:24).

Although Mollie testified she felt devastated for some unspecified length of time, she did not present proof of a change in her mental state related to Roberta's estate planning that "significantly affect[ed]" her "everyday life" or "require[d] significant treatment[,]" as required by *Osborne*. 399 S.W.3d at 17. Even if we assume, *arguendo*, that the jury fully embraced Mollie's testimony in this regard, her claim still fails because she did not present expert medical proof that her emotional injury is severe. *Osborne*, 399 S.W.3d at 17-18 ("plaintiff claiming emotional distress damages must present expert medical or scientific proof to support the claimed injury or impairment").

Merely presenting expert testimony that a plaintiff has a diagnosed medical or mental condition, such as PTSD from an episode alleged to have occurred thirty years earlier, is insufficient to meet *Osborne*'s requirement that an expert must testify that a plaintiff's current condition is severe.

Because Dr. Allen's expert testimony failed to support the third element of Mollie's IIED claim, and because we were directed to no other expert scientific or medical evidence to support that element of the claim, we conclude the circuit court should have granted Roberta's motion to direct the verdict and should not have instructed the jury as to that claim in Instruction No. 10.

For the reasons stated, we reverse the judgment on the IIED claim.

VII. Punitive Damages Not Recoverable When Underlying Claims Not Proven

Roberta, Bill, and Glen Oak contend the circuit court should not have given a punitive damages instruction because they should have prevailed on both claims to which the punitive damages instruction applied – the tortious interference with devise claim, and the IIED claim. The claim and the jury's punitive damages award were premised upon the jury's first having found for Mollie on the claims of wrongful interference with devise or inheritance, or IIED. (R. at 1876-77). Because we reverse the judgment as to both claims, we must reverse the dependent punitive damages awarded pursuant to the circuit court's Instruction No. 11.

VIII. No Evidence Supports Claim Roberta Breached Duty as Trustee of Stanley's Trust

Mollie's tendered second amended complaint alleges "Roberta breached her fiduciary duties as trustee of Stanley's trust by revoking her 2000 Trust Agreement and defeating the funding mechanism for the equalizing payment provided for by Stanley's trust." (R. at 994, ¶ 105). However, the circuit court denied the motion to file a second amended complaint (R. at 1080) and neither the claim nor the quoted language appears in prior versions. (R. at 599-630).

Nevertheless, over the Appellants' objection, the circuit court curiously instructed the jury that it should find in favor of Mollie regarding Roberta's breach of fiduciary duty as trustee of Stanley's trust if it believed Roberta "fail[ed] to exercise the utmost good faith in the best interests of Mollie, in a manner consistent with the provisions of the Trust documents and the intentions of Stanley Dickson" and that such failure caused Mollie financial harm. (R. at 1860). Even assuming, solely for purposes of argument, that the claim for breach of fiduciary duty against Roberta in her role as trustee of Stanley's trust was pleaded adequately, we agree with Appellants that the claim was fatally flawed.

As discussed previously, Roberta had a right to amend her estate planning, even if the disinheriting effects of those amendments could be considered odious to some. Appellees have not shown that Roberta mismanaged

the actual assets of Stanley's trust. We, therefore, again reject Appellees' argument that Stanley guaranteed an equalization payment to Mollie. He did not.

As previously explained, Stanley could have used estate planning to make sure an equalization payment occurred but, for reasons undiscernible from the record, he chose not to do so. The Appellees cannot direct this Court to language in any of the documents submitted as proof, or indeed anything in the record or Kentucky jurisprudence, imposing a duty on Roberta that was breached by the independent estate planning she undertook after Stanley's death.

Resolution of this claim requires nothing more than reading all the estate planning documents of Stanley and Roberta and applying statutory and common law. Doing so against the backdrop of Mollie's claim and Instruction No. 5 leads to only one conclusion as a matter of law – that Mollie's claim against Roberta for breach of duty as Stanley's trustee is not a viable claim and should have been dismissed.

For the various reasons discussed herein, the circuit court should not have submitted this cause of action to the jury. The jury's verdict in favor of Mollie on the Instruction No. 5 – Breach of Fiduciary Duty as Trustee, is reversed.

IX. Instruction on Bill's Breach of Duties as Manager of Glen Oak Is Erroneous Because It Failed to Articulate Proper Standard for Liability Expressed in Applicable Statute

"Errors alleged regarding jury instructions are considered questions of law and are to be reviewed on appeal under a *de novo* standard of review." *Peters v. Wooten*, 297 S.W.3d 55, 64 (Ky. App. 2009) (citing *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006)).

Instruction No. 6 allowed the jurors to find for Mollie if they believed Bill failed:

> to always exercise the utmost good faith in the best interests of the company and the best interests of Mollie, as a member, in conducting the affairs of the family business, managing its property and handling matters related to the operations of Glen Oak, LLC, including the duty to exercise sound and reasonable business judgment to protect and further the financial interests of Mollie[.]

(Instruction No. 6). This instruction describes an elevated standard of care.

However, this is not the standard of care established by the legislature to guide juries in measuring the line between actionable conduct and acceptable conduct by a limited liability company manager. KRS 275.170(1). Bill argues the instruction was fatally flawed because it did not incorporate the statutory language of KRS 275.170. We agree.

"[W]here statutes are applicable, trial courts must instruct in statutory language." *Farmland Mut. Ins. Co. v. Johnson*, 36 S.W.3d 368, 390 (Ky. 2001)

(citation and internal quotation marks omitted). Kentucky limited liability companies are creatures of statute and thus governed by applicable provisions of the Kentucky Revised Statutes. *Turner v. Andrew*, 413 S.W.3d 272, 275 (Ky. 2013). KRS 275.170 plainly states the standard of care for managers of limited liability companies, as follows:

> Unless otherwise provided in a written operating agreement:
>
> (1) With respect to any claim for breach of the duty of care, a member or *manager shall not be liable*, responsible, or accountable in damages or otherwise to the limited liability company or the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company *unless the act or omission constitutes wanton or reckless misconduct.*

KRS 275.170(1) (emphasis added).

Appellees have not cited any provision in the operating agreement that would make the KRS 275.170(1) standard of care inapplicable. We have read the agreement for ourselves and find none. The statute therefore applies.

"By failing to incorporate [statutory duty language], the instruction given by the trial court does not accurately set forth the applicable law." *Sargent v. Shaffer*, 467 S.W.3d 198, 208 (Ky. 2015). This deviation between the circuit court's standard-of-duty instruction and the legislature's standard-of-duty language is not inconsequential. The difference lowers the measure of proof necessary to

render a verdict in Mollie's favor from requiring a finding that Bill's actions constituted wanton or reckless misconduct under the statute, to requiring a finding of failure to exercise utmost good faith to protect and further Mollie's interests.

Mollie does not address KRS 275.170(1)'s wanton or reckless conduct requirement in her responsive brief. That is, she does not argue the error was harmless. We conclude the error is not harmless, but prejudicial. "Where the statute speaks in no uncertain terms, it hardly can be said that the use in an instruction of other terms not meaning substantially the same thing is not prejudicial error." *McCulloch's Adm'r v. Abell's Adm'r*, 272 Ky. 756, 115 S.W.2d 386, 390 (1938).

The verdict and judgment in favor of Mollie on this claim is vacated and remanded for a new trial with an instruction modeled on the applicable statute.

X. Bill Can Be Liable and Mollie Can Recover for Breach of Operating Agreement; Verdict Must Be Vacated Because Instruction Improperly Allowed Jury to Find Against Roberta

Appellants raise several arguments regarding the breach of contract verdict under Instruction No. 8. First, they contend Bill individually cannot be liable for breaching the Glen Oak operating agreement because he was not a party thereto. We disagree.[27]

[27] Appellants do not actively contest that the Glen Oak operating agreement is a contract, and we have used contract interpretation principles to construe operating agreements, albeit in

Section 12.4 of the operating agreement unambiguously provides that the agreement is "binding upon the Members, the officers, and their respective successors . . . ." Section 6.3 of the operating agreement states in relevant part that "[t]he initial managing member shall be William M. Dickson who shall serve until he is removed or a successor is appointed." There is no indication that Bill was ever removed or succeeded. Thus, he was bound by the operating agreement and liable for its breach.

Second, Appellants argue the verdict is improper because the jury instructions permitted Mollie to recover damages for Bill's breach even though Dickson Oaks, not Mollie individually, was a party to the operating agreement. (R. at 1867-1868). We are unpersuaded by this argument.

"It is the law in this jurisdiction that no stranger to a contract may sue for its breach unless the contract was made for his benefit." *Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky. App. 1985). That is to say, "one for whose benefit a contract is made may maintain an action thereon in his own name even though the undertaking is not directly to or with him." *Aetna Ins. Co. v. Solomon*, 511 S.W.2d 205, 208 (Ky. 1974).

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unpublished cases. *See, e.g., Rogers v. Family Practice Properties of Lexington, LLC*, 2015-CA-001557-MR, 2017 WL 4334111, at *4 (Ky. App. Sept. 29, 2017).

The proof supports the conclusion that Dickson Oaks was created for Mollie's sole benefit, and Glen Oak, in turn, was created for the benefit of its four owners, including Mollie through Dickson Oaks. Consequently, though better practice would have been to list Dickson Oaks as the party entitled to recover for breach of the operating agreement, the trial court's decision to permit Mollie to recover was at most harmless error.

We thus hold an instruction that allows the jury to find for Mollie and against Bill for breach of the Glen Oak, LLC Operating Agreement is not improper, and we would affirm if Instruction No. 8 were so limited. It was not. Instruction No. 8 allowed the jury to decide in favor of Mollie if it believed either Bill *or Roberta* breached the agreement. The jury's answer of "Yes" on Verdict Form E leaves open the possibility that the jury found Roberta breached the agreement and not Bill. On this record, that error is prejudicial and must be reversed.

Appellants argue the circuit court erred by permitting the jury to find that Roberta and/or Bill breached the operating agreement despite having granted a directed verdict on Roberta's individual role in Glen Oak's operation/dissolution. (VT 8/29/16; 1:23:53). We agree.

The circuit court, in fact, did direct a verdict on this count of the complaint in favor of Roberta. This justified Roberta's counsel's decision to

present no evidence to defend her against this claim. Then, contradicting its directed verdict, the circuit court instructed the jury that it could find that "Roberta or Bill, or both of them, breached the contract by failing to abide by the pertinent provisions of the Operating Agreement . . . ." (R. at 1867). Having granted her a directed verdict, the trial court erred by permitting the jury to find Roberta liable.[28]

This error was not harmless. It is impossible to tell whether the verdict was against Bill alone (which we could affirm), or against Roberta alone or in concert with Bill (which we would have to reverse in accordance with the directed verdict in Roberta's favor). Therefore, the jury's verdict and judgment based on Instruction No. 8 must be vacated and remanded for a new trial at which the instruction should name only Bill and not be tainted by the possibility of finding liability against a party previously determined not to be at fault.

XI. Aiding and Abetting Verdicts Must Be Reversed to the Extent the Verdicts upon Which They Depend Are Reversed

Instruction No. 7 allowed the jury to find against Bill for aiding and abetting Roberta in her breaches of duty identified in Instruction No. 4 (wrongful interference with inheritance) and Instruction No. 5 (breaches as Stanley's trustee),

[28] Though Appellants objected contemporaneously to the instruction on other grounds they did not raise the precise objection lodged here. *See* VT 8/31/16; 8:45:42. However, they did raise that objection in their post-trial motion for judgment notwithstanding the verdict/for a new trial. (R. at 1994). In any event, allowing the jury to find a party liable after having granted that party a directed verdict is a palpable error affecting Roberta's substantial rights. *See* CR 61.02.

and/or to find Roberta aided and abetted Bill in breaching his duty identified in Instruction No. 6 (breaches as manager of Glen Oak).

We reverse the verdict and judgment under Instruction No. 7 as pertains to Bill because we have reversed the verdicts decided under Instruction No. 4 and Instruction No. 5.

We vacate the verdict and judgment under Instruction No. 7 as pertains to Roberta and remand for a new trial because we have vacated and remanded for a new trial the verdict under Instruction No. 6.

Mollie's claims for aiding and abetting, a term used far more frequently in a criminal context, are essentially claims for civil conspiracy. *See Insight Ky. Partners II, L.P. v. Preferred Automotive Serv., Inc.*, 514 S.W.3d 537, 556-57 (Ky. App. 2016) (explaining the tort of aiding and abetting a breach of fiduciary duty, a claim that is effectively one of civil conspiracy, warrants apportionment pursuant to KRS 411.182). But no matter the name, such claims are not free-standing claims; rather, they merely provide a theory under which a plaintiff may recover from multiple defendants for an underlying tort. *See Davenport's Adm'x v. Crummies Creek Coal Co.*, 299 Ky. 79, 184 S.W.2d 887, 888 (1945).

The underlying torts which Bill is alleged to have aided and abetted were: (1) Roberta's alleged wrongful interference with inheritance and (2) Roberta's alleged breach of fiduciary duties as a trustee of Stanley's trust.

We held the first tort which Bill is alleged to have aided is not a recognized cause of action in Kentucky. Therefore, Bill could not have aided and abetted its commission.

We also held, as a matter of law, that Roberta's personal estate planning after Stanley's death did not impact the operation of Stanley's trust, nor was such estate planning prohibited by any provision of any of Roberta's and Stanley's estate planning documents created before Stanley's death. Therefore, because there was no basis for the claim against Roberta for breach of fiduciary duties as Stanley's trustee, Bill could not have aided or abetted its commission.

However, we merely vacated and remanded the verdict and judgment entered pursuant to Instruction No. 8 (breach of the operating agreement by Bill). It is still possible that a properly instructed jury could find against Bill on that claim. Therefore, the claim that Roberta aided and abetted Bill in that breach, although dependent upon it, remains a viable claim against her.

XII. Award of Damages Must Be Set Aside as an Aggregate Damages Award That Cannot, on This Record, Be Divided Among the Remaining Causes of Action

At Appellees' request (VT 8/31/16; 9:27:05), the trial court's instructions required the jury to make one overarching damages award for the following claims: breach of fiduciary duty as attorney-in-fact against Roberta (Instruction No. 4); breach of fiduciary duty as trustee of Stanley's trust against Roberta (Instruction No. 5); breach of fiduciary duty as manager of Glen Oak against Bill (Instruction No. 6); aiding and abetting Roberta's breach of fiduciary duties against Bill (Instruction No. 7); aiding and abetting Bill's breach of fiduciary duties against Roberta (Instruction No. 7); and breach of contract against Roberta and Bill (Instruction No. 8).[29] In other words, the jury was not asked to award separate damages for each of those individual causes of action. Appellants contend the lump sum or aggregate verdict is improper. We agree.

A jury should be asked to assess damages for each cause of action against each defendant separately. *See, e.g., Brewer v. Hillard*, 15 S.W.3d 1, 14 (Ky. App. 1999) ("Because there were two separate and distinct claims against two

[29] Appellants' counsel did not contemporaneously raise an aggregate verdict objection. VT 8/31/16; 9:29:55. But any lack of preservation is not dispositive under these facts because the case is being remanded on other grounds. Our discussion is intended to guide the trial court on remand, not as an independent basis for relief.

tortfeasors, there should have been two damage instructions . . . .”). Therefore, the jury’s damages verdict for these sundry claims is vacated and remanded.

XIII. Review of Evidentiary Rulings Unnecessary

Appellants take issue with several evidentiary rulings made by the trial court. However, Appellants’ arguments are fatally terse, containing only fleeting arguments and not supported by citation to relevant authority. Indeed, it is difficult to discern with precision exactly what errors Appellants raise as grounds for relief because, in the span of a short paragraph, they do little more than mention a blizzard of six or seven rulings – one of which was actually in their favor, concluding generically that “[t]hose rulings were an abuse of discretion . . . .” (Appellant’s brief, p. 25).

Naked assertions of error unaccompanied by sufficient citations to the record and pertinent authority, or lacking an adequate discussion, are insufficient to merit appellate relief. *See, e.g.*, *Harris v. Commonwealth*, 384 S.W.3d 117, 131 (Ky. 2012) (“Harris completely fails to provide any analysis, any arguments or any legal authority for why the trial court’s alleged errors violate his state and federal constitutional rights. Instead, he simply makes a broad statement of error, and then leaves to this Court the task of determining, researching and making his arguments

for him. That is not the function or responsibility of this Court.").[30] In short, because Appellants have not shown with necessary detail how the trial court's evidentiary rulings require relief (and bearing in mind the reversals and remands on various portions of the verdict and at least some of the claimed errors may not recur on remand), we decline to burden this already lengthy opinion by engaging in the detailed analysis the Appellants declined to provide.

XIV. Arguments Regarding Nonconforming Judgment Is Moot

Finally, Appellants offer another passing argument, consisting of one substantive paragraph, that the judgment does not conform to the jury's verdict because the judgment defines "Plaintiff" as Mollie *et al.* but the jury "was not instructed and did not render any verdict in favor of Dickson Oaks, LLC" – the only other named plaintiff. This argument is moot because the judgment is being vacated. On remand, better practice would be for the trial court to specify in both the jury instructions and final judgment which plaintiff brought which claim against which defendant and the resultant verdict thereon as to each party.

XV. Attorney Fees Issue Is Moot; Can Be Addressed on Retrial

Mollie sought attorney fees based upon the breach of contract claim, believing she was entitled to them for the breaches of the Glen Oak, LLC

[30] We note that Appellant's sought to file a brief above the usual page limit but filed a motion to withdraw that prior motion after tendering a brief which was within the limits of CR 76.12.

Operating Agreement. However, because the jury's verdict in Mollie's favor on that claim is being vacated, the question of whether her motion for attorney fees was timely filed is moot. The matter may be addressed after retrial, if appropriate.

CONCLUSION

For the foregoing reasons, the judgment in favor of Appellees is reversed in part, vacated in part, and remanded for proceedings consistent with this opinion.

ALL CONCUR.

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